No. 16,455

United States Court of Appeals

For the Ninth Circuit

LUCY K. COHEN,

Appellant,

vs.

WESTERN HOTELS, INC., and
E. B. DEGOLIA,

Appellees.

Appeal from the United States District Court for the Northern District of California, Southern Division.

Honorable Willis W. Ritter, District Judge.

BRIEF FOR APPELLANT.

FREED & FREED,
KURT W. MELCHIOR,
1069 Mills Building,
San Francisco 4, California,

BARRY SIDMAN,
1700 K Street, Northwest,
Washington 6, D. C.,

Attorneys for Appellant.

STRASSER, SPIEGELBERG, FRIED & FRANK,
1700 K Street, Northwest, Washington 6, D. C.,
Of Counsel.

Subject Index

Page

Jurisdictional statement 1

Statement of the case 2

Specification of errors 3

Summary of argument 9

Argument 11

I.

The court erred in excluding appellant's expert testimony 11

a. Rule 43(a), Federal Rules of Civil Procedure, required the court to apply the most liberal rules of evidence, whether state or federal 11

b. Under applicable California law the testimony of appellant's expert witness was relevant and admissible 14

c. The testimony of appellant's expert witness was also admissible under federal law 20

d. Appellant's witness was properly qualified as an expert, and exclusion of his testimony made impossible the jury's intelligent determination of the issue of negligence 22

II.

Other erroneous evidentiary rulings of the court were highly prejudicial and constitute reversible error 24

a. The court erroneously and inconsistently admitted testimony of appellees' non-expert witness as to the proper manner of laying a rug, though the testimony of appellant's expert witness was excluded ... 24

b. The court's admission, over objection, of testimony by appellees' witness as to the absence of previous accidents and the condition of the rug at the date of trial was materially prejudicial error 25

III. Page

The court below erred in permitting appellees to amend their pleading near the conclusion of the trial 28

IV.

The court's conduct during the trial unfairly prejudiced appellant's case 30

V.

The trial court's charge was too general 31

VI.

The instructions actively misled the jury 33

Conclusion 34

Table of Authorities Cited

Cases Pages

Batelli v. Kagan and Gaines Co., 236 F. 2d 167 (9th Cir. 1956) 13

Boerner v. United States, 117 F. 2d 387 (2d Cir. 1949) 12

Bratt v. Western Air Lines, 155 F. 2d 850 (10th Cir. 1946) .21, 22

Builders Steel Co. v. C.I.R., 179 F. 2d 377 (8th Cir. 1950) 21

Burch v. Valley Motor Lines, Inc., 78 Cal. App. 2d 834, 179 P. 2d 47 (1947) 18

Campbell v. Fong Wan, 141 P. 2d 43 (1943) 17

Carty v. Boeseke-Dawe Co., 2 Cal. App. 646, 84 Pac. 267 (1906) 27

Cheffey v. Pennsylvania R. Co., 79 F. Supp. 252 (E.D. Pa. 1948) 29

Chesapeake & Ohio Ry. Co. v. Newman, 243 F. 2d 804 (6th Cir. 1957) 26

Crawford v. Alioto, 105 Cal. App. 2d 45, 233 P. 2d 148 (1951) 33

Page

Detroit T. & I. R. Co. v. Banning, 173 F. 2d 752 (6th Cir. 1949) 21

Een v. Consolidated Freightways, 220 F. 2d 82 (8th Cir. 1955) 21
Eger v. May Department Stores, 120 Cal. App. 2d 554, 261 P. 2d 281 (1953) 17
Ekblom v. G. O. Reed, Inc., 71 F. 2d 399 (5th Cir. 1934) .. 23
Empire Oil & Refining Co. v. Hoyt, 112 F. 2d 356 (6th Cir. 1940) 22

Farris v. Interstate Circuit, Inc., 116 F. 2d 409 (5th Cir. 1941) 22
Forts v. So. Pac. Co., 30 Cal. App. 633, 159 Pac. 215 (1916) 18

Garford Trucking Corp. v. Mann, 163 F. 2d 71 (1st Cir. 1947) 20
George v. Bekins Van & Storage Co., 33 Cal. 2d 834, 205 P. 2d 1037 (1949) 16

Hilleary v. Earle Restaurant, Inc., 109 F. Supp. 829 (D.D.C. 1952) 26
Howland v. Oakland C. St. Ry. Co., 110 Cal. App. 475, 126 Pac. 391 (1912) 18

The Kearney, 3 F. Supp. 718 (E.D. N.Y. 1933) 33

Laird v. T. W. Mather, Inc., 51 Cal. 2d 210 32
Larkin v. May Department Stores Co., 250 F. 2d 948 (3d Cir. 1958) 21

Manney v. Housing Authority of Richmond, 79 Cal. App. 2d 453, 180 P. 2d 69 (1947) 16
McLain v. Dahlstrom M. Door Co., 19 Cal. App. 475, 126 Pac. 391 (1912) 18
McReynolds v. National Woodworking Co., 26 F. 2d 975 (D.C. Cir. 1928) 23
Mourikas v. Vardianos, 169 F. 2d 53 (4th Cir. 1948) 20
Mulhall v. Keenan, 85 U.S. 342 (1873) 29
Murphy v. Lake County, 106 Cal. App. 2d 61, 234 P. 2d 712 (1951) 27

Pages

New York Life Ins. Co. v. Schlatter, 203 F. 2d 184 (5th Cir. 1953) 13
New York Life Ins. Co. v. Wolf, 85 F. 2d 162 (8th Cir. 1936) 21

Oakes v. Chapman, 158 Cal. App. 2d 78 (1958) 18
Olsen v. Realty Hotel Corp., 210 F. 2d 785 (2d Cir. 1954) 13
Ordway v. Hilliard, 266 App. Div. 1056, 44 N.Y.S. 2d 819 (1943) 19

People v. Carter, 48 Cal. 2d 737, 312 P. 2d 665 18
People v. Cole, 47 Cal. App. 2d 68, 301 P. 2d 894 (1956) .. 16
People v. King, 104 Cal. App. 2d 298, 231 P. 2d 156 (1951) 16
People v. Martinez, 38 Cal. 2d 556, 241 P. 2d 224 (1952)... 16
People v. Wilson, 25 Cal. 2d 341, 153 P. 2d 720 (1944) 16
Peoples Gas Co. of Kentucky v. Fitzgerald, 188 F. 2d 198 (6th Cir. 1951) 20
Petroleum Carrier Corp. v. Snyder, 161 F. 2d 323 (5th Cir. 1947) 13
Phillips Petroleum Co. v. Payne Oil Corp., 146 F. 2d 546 (10th Cir. 1944) 22
Pierce v United Gas & Electric Co., 161 Cal. 176, 118 Pac. 700 (1911) 33
Pollack v. Metropolitan Life Ins. Co., 138 F. 2d 123 (3d Cir. 1943) 13
Potlatch Oil & Refining Co. v. Ohio Oil Co., 199 F. 2d 766 (9th Cir. 1952) 13

Quercia v. United States, 289 U.S. 466 (1933) 31, 33

RKO Radio Pictures, Inc., v. Sheridan, 195 F. 2d 167 (9th Cir. 1952) 13
Roche v. Llewellyn Iron Works Co., 140 Cal. 563, 74 Pac. 147 (1903) 33
Rodela v. So. Cal. Edison Co., 148 Cal. App. 2d 708, 307 P. 2d 436 (1957) 16, 18

Schillie v. Atchison, T. & S. F. Ry., 222 F. 2d 810 (8th Cir. 1955) 13
Sheehan v. Hammond, 2 Cal. App. 371, 84 Pac. 340 (1906) 27
Shipley v. Pittsburgh & L. E. R. Co., 83 F. Supp. 722 (W. D. Pa. 1949) 22

Pages

Silveira v. Iverson, 128 Cal. 187, 60 Pac. 687 (1900) 17
Smith v. White, 48 F. Supp. 554 (E.D. Mo. 1942) 29
Southern Pac. Co. v. Guthrie, 180 F. 2d 295 (C.A. 9th, 1949, op. adh. to, 186 F. 2d 926, cert. den. 341 U.S. 904) 32
Southern Pac. Co. v. Libbey, 199 F. 2d 341 (9th Cir. 1952) 13
Sowden v. Idaho Quartz Mining Co., 55 Cal. 443 (1880) .. 19
Sprinkle v. Davis, 111 F. 2d 925 (4th Cir. 1940) 31
State Farm Mut. Auto Ins. Co. v. Porter, 186 F. 2d 834 (9th Cir. 1950) 13

Thompson v. B. F. Goodrich Co., 48 Cal. App. 2d 723, 120 P. 2d 693 (1942) 26

United States v. Smith, 117 F. 2d 911 (9th Cir. 1941) 13

Waldez v. Percy, 35 Cal. App. 2d 485, 96 P. 2d 142 (1939) 16
Wallace v. Speier, 60 Cal. App. 2d 387, 140 P. 2d 900 (1943) 18
Woodworkers Tool Works v. Byrne, 191 F. 2d 667 32

Codes

Code of Civil Procedure, Section 1870(9) 14, 15

28 U.S.C., Section 1291 1

Rules

F.R.C.P.:
Rule 15(b) 28
Rule 43(a) 10, 11, 12, 13, 14, 20

Texts

88 C.J. 2d, Trials, Sections 379b and 386 33

3 Moore, Federal Practice 15.13 at pp. 847-848 (2d ed. 1948) 29

5 Moore, Federal Practice, Section 43.04 (2d ed. 1951) 13

7 Wigmore on Evidence, pp. 1-29 (2d ed. 1940) 16

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BRIEF FOR APPELLANT.

Appeal from the United States District Court for the Northern District of California, Southern Division.

Honorable Willis W. Ritter, District Judge.

JURISDICTIONAL STATEMENT.

Appellant brought a diversity action against appellees for damages for personal injuries. The judgment of the District Court in favor of appellees was filed on January 8, 1959. Appellant's motion for a new trial was denied on January 27, 1959. A notice of appeal was filed on February 26, 1959. The jurisdiction of this court is invoked under 28 U.S.C. § 1291.

STATEMENT OF THE CASE.

Appellant, a resident of the District of Columbia, had been an overnight guest at appellees' Maurice Hotel in San Francisco. Attempting to depart for her home on the morning of August 14, 1957, she tripped and fell over the edge of a rug loosely placed on the floor of the hotel lobby. She sustained severe and permanent bodily injuries and other loss and damage.

Appellant charged appellees, owners and operators of the hotel, with negligently permitting the rug to be installed and maintained in a hazardous and unsafe condition. She sought to prove that the rug lacked a proper matting and was not fastened securely to the floor; it would lift off the floor and curl up. With the rug's edges raised, forming ridges or loops, the rug constituted a dangerous hazard to persons walking over it. She claimed that the hotel had notice of these dangerous conditions but permitted them to continue. The defendants denied their negligence and pleaded plaintiff's contributory negligence. The District Court barred the testimony of appellant's expert witness but admitted that of appellees' nonexpert witness on the same issue, improperly permitted appellees to amend their pleading on the last afternoon of the trial, committed other prejudicial error while evidence was being taken, and instructed the jury inadequately and improperly.

Further references to the evidence will be made as necessary during the argument.

The jury found for appellees and the court rendered judgment accordingly.

SPECIFICATION OF ERRORS.

1. The court erroneously rejected the testimony of appellant's expert witness as to the proper way to install the rug in appellees' hotel lobby, and his opinion on the safety and propriety of appellees' installation.

Mr. Shaul P. Yosiph, called as an expert witness by the appellant, was asked:

> "Q. Now, I will show you Plaintiff's Exhibits 1, 2, 3 and 4 in evidence and ask you to look at those exhibits and tell the jury whether the condition of the rug in the lobby of the Hotel Maurice, when you examined it, was the same as it is in these pictures." [R. 65.]

The District Court sustained appellees' objection to the question. [R. 65.] Appellant made an offer of proof, and the court stated its grounds for its ruling:

> "Mr. Melchior. The expert, if asked, will testify that he compared those pictures with the lobby at the time he was there and he concludes that the conditions are the same.
>
> The Court. Now, of what interest is that to us whether they are or not?
>
> Mr. Melchior. Well, he did not make his inspection at the time of the accident, he made his inspection recently and he is going to say, he is going to testify as to the unsafeness of the conditions that he found there and——

> The Court. Well, I don't think we are going to let him do that. That's a conclusion of your expert, that isn't the subject of expert testimony." [R. 67.]

Appellant argued that under the applicable California law the witness's testimony was admissible. [R. 67-68.] The court rejected the applicability of California law:

> "The Court. If you were in the State Court you might persuade me, but you are not. This is a procedural matter here and we follow our own procedure.
>
> Mr. Melchior. I don't think it is a procedural matter, your Honor.
>
> The Court. Sure it is. Admissibility of evidence. [etc.]" [R. 68.]

Appellant made a further offer of proof:

> "Mr. Melchior. Well, if the court please, this man would, if he were permitted to testify, make demonstrations here in court as to the type of mat which must be placed under a carpet or rug which is not fixed to the floor. This would be a matter of expert testimony, and we [sic] will testify as an expert that the mat that is placed under this rug, that was under the rug at the time of the accident, is a mat which (58) causes a tendency to slip and which causes the rug to slip." [R. 71.]

This offer was excluded. [R. 72.]

Appellant asked her duly qualified expert witness the following hypothetical question, based on facts in evidence:

"Q. (By Mr. Melchior). Mr. Yosiph, assuming that in a public hotel lobby a rug is laid as shown in Plaintiff's Exhibit 1, which you held in your hand, and assuming that a mat lies under that rug which extends four to five inches short of the edge of the rug——

* * * *

Q. (By Mr. Melchior). (Continuing). And assuming that a person weighing 150 pounds had walked across that rug carrying baggage in the direction from the pillars which you see in the picture to the door, what would be the effect of those facts upon the way in which the edge of the rug adheres to the floor?"

To this, the court sustained the following objection:

"Mr. Sedgwick. Just a moment, please. Your Honor, please, I sound like a broken record but it is incompetent, irrelevant and immaterial, no proper foundation laid, not the proper subject of expert testimony, calling for the opinion and conclusion of this witness, invading the province of the jury and an improper hypothetical question not based on any proper hypothesis in the evidence in this case." [R. 92.]

2. The court erroneously admitted the testimony of the defense witness Hoffer regarding the absence of previous accidents, the condition of the rug at the date of trial, and the alleged proper method of installing the rug.

On direct examination of witness Alex F. Hoffer, manager of the Maurice Hotel, by defense counsel, the following questions were asked, and answer was permitted over objection:

"Q. Has anyone else ever fallen and presented a claim as the result of those rugs?

A. In the 15 years I have been there, 12 years the rugs have been laid, never any problem.

Q. What is the condition of the rug at the present time?

Mr. Melchior. I object——

The Witness. It is in good shape.

The Court. Well, the objection is overruled. It's in good shape—of course, the basis of your objection, Mr. Melchior, is that it is not material because it isn't at the time of the accident. Now, I would like the jury to understand the basis of my ruling. The basis of my ruling is that, if [264] that is the same rug and it is now in good shape, the fair inference can be drawn that at the time of the accident it was in good shape." [R. 183-84.]

The court permitted this non-expert witness to testify on a subject solely of expert testimony:

"A. No, the pad does not come out to the edge of the rug. If they did, it would be all wrong; you have to allow for the drop of your rug to come down, depending upon the thickness [259] of your rug. Why, you got to cut your pad further back so that you allow a contour to it, and depending upon the thickness of your padding—if you use a 40-ounce felt, rubber or other equipment, it has to have a certain spread." [R. 179.]

Appellant's objection thereto and the court's ruling are as follows:

"Mr. Melchior. I move this answer be stricken on the ground your Honor has ruled for the pur-

poses of this case that the jury themselves are to be the judges of how the rug should be properly laid and is not a matter of expert testimony. Moreover, this gentleman has not been shown to have any particular qualifications.

The Court. He isn't talking about any expert testimony; he is talking about whether there is a space between the edge of the rug and the mat." [R. 179.]

3. The court displayed bias toward appellant's case, as for instance in allowing the following question it permitted to be asked of appellant's witness Marshall:

"Q. (By Mr. Sedgwick). Do you have his telephone number?

A. No, I don't.

Q. Well, let me give it to you. You can call him. He is there any time you want to call him and so is his wife. If you really wanted him you could go down and get him right now. The telephone number is Juno 3-9696. Do you want to make a note of it?"

When appellant's counsel objected, the court told the jury that "we don't tolerate that kind of argument." [R. 107.]

4. The court refused to give the following requests to charge offered by appellant:

"Plaintiff's Proposed Instruction No. 18.

Contributory Negligence—Unanticipated Danger.

Contributory negligence is not imputable to a plaintiff for failing to look out for a danger which she had no reasonable cause to apprehend.

Laird v. T. W. Mather, Inc., 51 A. C. 208 at 216."

"Plaintiff's Proposed Instruction No. 19.

Failure to Observe Obvious Danger.

It is possible that you may find that the rug was in a dangerous condition, but that Mrs. Cohen might have seen the dangerous condition of the rug and thus have avoided the accident by stepping around it. But it does not follow from the fact that she might have seen this condition had she looked, that she was contributively negligent as a matter of law. All of the circumstances must be taken into account by you, and if you find that there was some reasonable excuse for a failure by Mrs. Cohen to observe danger from the rug, her conduct may be excused even though the danger was obvious. It was not necessarily negligent to fail to look for dangers in a hotel or business establishment when the ordinarily prudent person would not in fact expect to find the condition where it is, or where she is likely to have her attention distracted as she approached it.

Laird v. T. W. Mather, Inc., 51 A. C. 208 at 215."

"Plaintiff's Proposed Instruction No. 20.

Contributory Negligence: Assumption That Way Is Clear.

Conceding for the sake of argument that, if Mrs. Cohen had looked down in front of her feet

she might have noticed any dangerous condition of the rug, nevertheless you may find that in the circumstances she was reasonably justified in assuming that her way was unobstructed, and that her failure to see it was not necessarily negligence.

Laird v. T. W. Mather, Inc., 51 A. C. 208 at 216."

The basis for the refusal was that the court was not going to make its charge "that specific". [R. 198.]

5. The court erroneously instructed the jury by improper use of the term "insurers":

"Now, the hotel proprietors, not only these hotel proprietors, but others, folks who serve the public, are not insurers, they don't insure against injury and they don't carry [289] that kind of legal responsibility." [R. 204.]

6. The court erred in permitting appellees to amend their pleading at the conclusion of the trial.

SUMMARY OF ARGUMENT.

The sole issues in this case were these: Was the appellees' rug improperly and insecurely placed in the hotel lobby, creating a danger to travelers and evidencing negligence on the part of appellees? Was appellant's fall caused by her own contributory negligence?

Appellant's every attempt to introduce expert testimony concerning the rug placement was blocked by

the District Court. That court misinterpreted federal law, which permits such testimony, and totally ignored the dictates of Rule 43(a), F.R.C.P., which designates the most liberal law of evidence, state or federal, as controlling. California evidentiary law would have permitted the expert testimony; the court's refusal to apply California law constitutes reversible error.

The paradoxical admission of testimony by appellees' non-expert witness on the propriety of the rug's installation compounds the error of the District Court. The lack of this witness's qualifications so to testify is unquestioned; allowing his testimony only highlights the court's erroneous rulings regarding appellant's expert witness.

Moreover, admission of testimony concerning the absence of previous accidents was error; it is clear that such testimony had no probative value, was irrelevant to the issue of appellees' negligence at the time of appellant's injury, and prejudiced appellant's cause.

The admission of testimony of appellees' witness as to the condition of the rug at the date of trial was error. Such testimony might be relevant where unquestioned conditions of permanency exist, so that a reflection from present condition on a past condition might be drawn. In this case, however, the gravamen of appellant's charge is the temporary nature of the rug installation. There is no permanency to the installation of a rug which is not securely fastened, and traveled upon by great numbers of persons. The

same question, when asked of appellant's witness on direct examination, was excluded.

It was error for the District Court to permit appellees to amend their pleading and change their position on the last day of trial. Appellant was taken by surprise and had no opportunity to refute the new last-minute position of appellees.

The trial court's charge on the crucial issues of negligence and contributory negligence was too general to be meaningful as to the issues raised by the evidence.

The unfortunate choice of words by the District Court, employing the term "insurers" in its instruction to the jury, materially prejudiced appellant. The jury was invited to confuse a lawyer's term of art with their laymen's concept of insurance coverage; receiving this misinformation directly from the court aggravated the harm that flows from insurance considerations in tort suits.

ARGUMENT.

I.

THE COURT ERRED IN EXCLUDING APPELLANT'S EXPERT TESTIMONY.

a. Rule 43(a), Federal Rules of Civil Procedure, required the court to apply the most liberal rules of evidence, whether state or federal.

To show that the rug over which appellant tripped had been installed and maintained by appellees in an improper and hazardous fashion, appellant sought

to introduce the testimony of the expert witness, Yosiph. All of his pertinent expert testimony, however, was blocked by the District Court without even a cursory inspection of the applicable principles of law, and on a premise so plainly erroneous that at this late date such an error is astounding. The court took the initiative toward preventing the reception of expert testimony, without any objection by appellees and without challenge to the expert's qualifications—the court simply volunteered the ruling that there would be no expert testimony. [R. 67-68.]

Rule 43(a), F.R.C.P., plainly states that evidence admissible in the local state courts shall be admitted in the federal District Courts. The rule reads in part as follows:

> "All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs. . . ."

The unanimous holding of all federal cases is that whatever law, state or federal, is most liberal in the reception of evidence is to be applied by the federal courts. For example, the court in *Boerner v. United States,* 117 F.2d 387, 391 (2d Cir. 1949), considered itself "directed by federal rule 43(a) to follow that holding on evidence, whether state or fed-

eral, which most favors admissibility." See also, *e.g., New York Life Ins. Co. v. Schlatter,* 203 F.2d 184 (5th Cir. 1953), where the court held that the rule which favors the reception of evidence governs, whether state or federal; *Schillie v. Atchison, T. & S. F. Ry.,* 222 F.2d 810 (8th Cir. 1955); *Petroleum Carrier Corp. v. Snyder,* 161 F.2d 323 (5th Cir. 1947); *Pollack v. Metropolitan Life Ins. Co.,* 138 F.2d 123 (3d Cir. 1943).

This court has been equally uniform in its holdings. In *RKO Radio Pictures, Inc., v. Sheridan,* 195 F.2d 167 (9th Cir. 1952), it stated that where California law permitted the admissibility of certain evidence, a federal court was governed by the state rule. In *Batelli v. Kagan and Gaines Co.,* 236 F.2d 167 (9th Cir. 1956), this court held certain depositions admissible, as required by Rule 43(a) where California law authorized their admission. See also, *Potlatch Oil & Refining Co. v. Ohio Oil Co.,* 199 F.2d 766 (9th Cir. 1952); *Southern Pac. Co. v. Libbey,* 199 F.2d 341, 348 (9th Cir. 1952); *State Farm Mut. Auto Ins. Co. v. Porter,* 186 F.2d 834, 840 (9th Cir. 1950); *United States v. Smith,* 117 F.2d 911 (9th Cir. 1941). And see, 5 Moore, Federal Practice, § 43.04 (2d ed. 1951).

The admissibility of expert testimony, like all other questions of evidence, is governed by Rule 43(a). *Olsen v. Realty Hotel Corp.,* 210 F.2d 785 (2d Cir. 1954). Yet, despite the clarity of Rule 43(a)'s language, and the consistent interpretation of that rule by federal courts, the District Court summarily re-

jected its application. The Court said, in barring the expert witness's testimony:

> "If you were in the State Court you might persuade me, but you are not. This is a procedural matter here and we follow our own procedure." [R. 68.]

Elsewhere, discussing the admissibility of evidence, and in the presence of the jury, the court stated to appellant's attorney:

> "You are talking about California law, we have our own procedure, hasn't anything to do with the State law. * * * We are not operating a state court of California, I told you last week." [R. 104.]

Clearly, the lower court ignored the most elementary principles governing the reception of evidence in the federal courts and the express direction of Rule 43(a). We recognize the latitude given to all courts, including California's, in receiving expert testimony, but their action, however wide its latitude, must be based on correct standards of judgment. Yet the standard used by the court below was most palpably wrong. That court in fact foreclosed itself all opportunity for the exercise of proper judicial discretion by ignoring the very subject of its discretion—California law.

b. Under applicable California law the testimony of appellant's expert witness was relevant and admissible.

The California Code of Civil Procedure, § 1870(9), provides in part:

"... evidence may be given upon a trial of the following facts:

"9. ... The opinion of a witness ... on a question of science, art, *or trade,* when he is skilled therein. ..." [Emphasis added.]

Appellant's witness Yosiph was a properly qualified expert, skilled in his trade. He had been employed in the rug business for three decades, and had delivered many public lectures on his trade. He had lectured in churches, schools and universities, and had twice before testified in court as an expert witness. He manufactured and sold a great variety of rugs and pads. Mr. Yosiph's skill, repute and experience in his trade combined amply to qualify him as an expert. [R. 62-65.]

After the court had ruled that the subject of his testimony required no expert witness [R. 67-68], some belated effort was made by appellees to question the witness's personal qualifications, because he was not "an expert on the coefficient of friction or anything of that kind." [R. 84.] As the witness said, "I am not a laboratory"; but he could testify on the basis of his ample experience in the trade (Cal. Code of Civil Procedure, § 1870(9); R. 86-87); and the court had already excluded all expert testimony on the safe placement of rugs as a *subject* not deserving expert attention. [R. 67-68.]

Moreover, California decisions reveal that testimony such as Yosiph was prevented from giving, from persons *not* skilled in a "laboratory" sense [R. 86],

has been consistently and readily admitted. California has been most liberal in the admission of expert testimony. Thus, in *Rodela v. So. Cal. Edison Co.,* 148 Cal. App. 2d 708, 307 P. 2d 436 (1957), the court stated: "It is now well settled that in this jurisdiction an expert may express an opinion upon the ultimate issue of the case." The court cited *People v. Martinez,* 38 Cal. 2d 556, 564, 241 P. 2d 224 (1952); *George v. Bekins Van & Storage Co.,* 33 Cal. 2d 834, 843-4, 205 P. 2d 1037, 1044 (1949); *People v. Cole,* 47 Cal. App. 2d 68, 301 P. 2d 894 (1956), all to the same effect. See also *People v. Wilson,* 25 Cal. 2d 341, 349, 153 P. 2d 720 (1944); *People v. King,* 104 Cal. App. 2d 298, 304, 231 P. 2d 156 (1951).

The liberal approach of California courts to expert testimony is clearly expressed in *Manney v. Housing Authority of Richmond,* 79 Cal. App. 2d 453, 180 P. 2d 69, 73 (1947), citing with approval the following language from 7 Wigmore on Evidence, pp. 1-29 (2d ed. 1940):

> "The opinions of experts are admitted in matters which are not within the common experience of men so that the general knowledge of a person of skill and experience in the particular field may enable him to form an opinion, where men of common experience would not be able to do so."

While the admission of expert testimony is discretionary with the trial court, yet the California rule is that, where an expert witness "disclosed sufficient knowledge of the subject to entitle his opinion to go to the jury," exclusion of his testimony constituted an abuse of discretion requiring reversal. *Wal-*

dez v. Percy, 35 Cal. App. 2d 485, 492, 96 P. 2d 142 (1939). In our case this rule equally requires reversal, inasmuch as the trial court failed totally to apply the required standard of discretion.

The California courts have uniformly implemented these principles. In *Eger v. May Department Stores,* 120 Cal. App. 2d 554, 558, 261 P. 2d 281 (1953), a witness who had "extensive experience and activities relating to parking lots" was held to be a qualified expert witness who could testify as to his opinion of the proper method of maintaining a parking lot. The court stated: "While ordinary persons have experience in the use of parking areas, that does not include knowledge of the operations needed to clean and maintain these areas." 120 Cal. App. 2d at 558. In *Campbell v. Fong Wan,* 141 P. 2d 43 (1943), expert testimony was admitted regarding the custom and usage of constructing scaffoldings. The court, cognizant of the importance of assisting a jury on a matter not readily within common knowledge, stated: "The testimony was necessary in order for the jury to come to an intelligent conclusion concerning the standard of care required of an ordinary man in constructing a scaffolding." 141 P. 2d at 45. Clearly in California an expert may testify as to the proper method of rug installation and maintenance in a hotel lobby.

The courts of California have held expert testimony admissible on the following points:

How to test a rope for rot. *Silveira v. Iverson,* 128 Cal. 187, 190, 60 Pac. 687 (1900);

How often plumbing fixtures should be inspected. *Wallace v. Speier,* 60 Cal. App. 2d 387, 140 P. 2d 900 (1943);

The correct way to unload a shafting. *Forts v. So. Pac. Co.,* 30 Cal. App. 633, 159 Pac. 215 (1916);

From how far away blood had been spattered. *People v. Carter,* 48 Cal. 2d 737, 312 P. 2d 665;

Whether a streetcar could have stopped in time to avoid a collision. *Howland v. Oakland C. St. Ry. Co.,* 110 Cal. App. 475, 126 Pac. 391 (1912);

The insecurity of a knot. *McLain v. Dahlstrom M. Door Co.,* 19 Cal. App. 475, 126 Pac. 391 (1912);

That a fire was of incendiary origin. *Rodela v. Southern Cal. Edison Co., supra.*

See also the list of cases and subjects in which such evidence was held admissible in *Burch v. Valley Motor Lines, Inc.,* 78 Cal. App. 2d 834, at 840-41, 179 P. 2d 47 (1947).

In the recent case of *Oakes v. Chapman,* 158 Cal. App. 2d 78 (1958), golf professionals were recognized as qualified expert witnesses, and testified as to safe places to stand on a golf course, and what course a golf ball may take in flight. The court explained its reasoning at pp. 83-84:

> "It is well settled that the testimony of an expert is admissible when such expert, because of his profession, or his peculiar skill and knowledge in some department of science not common to men in general, *enables him to draw an inference where men in general would be left in doubt.*" [Emphasis added.]

This precisely describes the thwarted function of Mr. Yosiph's testimony. He was prevented from showing, by testimony and demonstration, that the mat placed under appellees' rug had a marked tendency to slip, causing the rug itself also to slip. He was prevented from showing the jury the type of mat required for a secure rug installation. [R. 71.] Thus, though the jury could have no knowledge of the proper and safe method of rug and mat placement, the court obligated them to decide this issue of negligence solely on surmise, without the essential and informative testimony of a competent expert. And where an expert is competent, the appellate court will not hesitate to reverse and direct the lower court to admit his opinion. *Sowden v. Idaho Quartz Mining Co.,* 55 Cal. 443 (1880).

The only reported case dealing with rug installation experts is very much like the case at bar. In *Ordway v. Hilliard,* 266 App. Div. 1056, 44 N.Y.S. 2d 819 (1943), judgment on a jury verdict for defendants was reversed where the issue was whether a fall was "caused by the negligent condition of a rug in defendant's apartment house." The court reversed because of the lower court's error *"in excluding the testimony of experts called by the plaintiffs to show that the manner of laying the throw rug in the hallway in question was contrary to good and well established practice."* [Emphasis added.]

The relevance, necessity and admissibility of a rug expert's testimony is as clear in California as it is in New York. Rugs are rugs, and juries know no

more about them in California than in New York. Even if there were doubt about the admissibility of the expert's testimony, Rule 43(a) demands that "the doubt should be resolved in favor of the admissibility of the evidence." *Mourikas v. Vardianos,* 169 F. 2d 53, 59 (4th Cir. 1948).

c. The testimony of appellant's expert witness was also admissible under federal law.

As has been stated, in the federal courts the most liberal available evidentiary rule governs. Thus, in *Garford Trucking Corp. v. Mann,* 163 F. 2d 71 (1st Cir. 1947), the court held state-of-mind evidence admissible under federal law, and said that even if state law deemed it inadmissible, it would come in under Rule 43(a), since the more liberal evidentiary rule would apply. And in *Peoples Gas Co. of Kentucky v. Fitzgerald,* 188 F. 2d 198, 201 (6th Cir. 1951), the court stated: "Though the Kentucky rule may be otherwise, the federal rule is to be followed, because it is most favorable to the reception of evidence." In that case a service manager of a gas company was allowed to give his opinion as to the cause of an explosion. The court expressed the general federal rule regarding expert testimony:

> ". . . the general rule permits a witness experienced in technical matters and qualified to do so to give his opinion in a matter which is not one of common knowledge, *although it involves an ultimate fact* to be finally decided by the jury." 188 F. 2d at 201. [Emphasis added.]

In *Builders Steel Co. v. C.I.R.,* 179 F. 2d 377, 380 (8th Cir. 1950), the court upheld expert testimony on the value of services, stating, "where the matter under inquiry is properly the subject of expert testimony, it is no objection that the opinion sought to be elicited is upon the issue to be decided." In *Detroit T. & I. R. Co. v. Banning,* 173 F. 2d 752, 756 (6th Cir. 1949), where a conductor and an engineer were asked as to the normality of a drop switch, they could answer, sinec they had "years of experience," and could offer an expert opinion on a matter "which is not one of common knowledge, although it involves an ultimate fact to be finally decided by a jury." See also *Een v. Consolidated Freightways,* 220 F. 2d 82 (8th Cir. 1955), and cases cited; *New York Life Ins. Co. v. Wolf,* 85 F. 2d 162 (8th Cir. 1936).

In accordance with *federal* law, then, as well, Mr. Yosiph should have been permitted to testify as to the custom and usage in the trade concerning rug installation, and the hazards where deviations from the proper method are encountered. Yet the lower court arbitrarily barred his testimony, despite the rule that "reasonable latitude must be permitted by a trial court to the expert in giving his testimony." *Larkin v. May Department Stores Co.,* 250 F. 2d 948, 950 (3d Cir. 1958). Since it is this Court's "right and duty . . . to determine whether in the exercise of the discretion committed to it, the trial court applied the correct legal standards," *Bratt v. Western Air Lines,* 155 F. 2d 850 (10th Cir. 1946), the lower court's

ruling, clearly misconceived and erroneous, merits reversal. *Phillips Petroleum Co. v. Payne Oil Corp.,* 146 F. 2d 546, 547 (10th Cir. 1944); *Shipley v. Pittsburgh & L. E. R. Co.,* 83 F. Supp. 722 (W. D. Pa. 1949).

d. Appellant's witness was properly qualified as an expert, and exclusion of his testimony made impossible the jury's intelligent determination of the issue of negligence.

Clearly, and this the lower court recognized, Mr. Yosiph was qualified as an expert witness in the trade of rug installation. It is well settled that an expert witness need not have extensive formal study or training in a specialized field to so qualify. In *Bratt v. Western Air Lines, supra,* a witness had no formal schooling in the field of airplanes, but did possess 29 years of practical experience. The court admitted his testimony as an expert witness, holding that a "witness may be competent to testify as an expert although his knowledge was acquired through the medium of practical experience rather than scientific study and research." Moreover, an expert has been defined to encompass "one who, by study or practical experience, has acquired a knowledge or skill or understanding of certain facts beyond that of an average man." *Farris v. Interstate Circuit, Inc.,* 116 F. 2d 409, 412 (5th Cir. 1941). See also, *Empire Oil & Refining Co. v. Hoyt,* 112 F. 2d 356, 360 (6th Cir. 1940), where the court stated that experts include "persons possessing special or peculiar knowledge acquired from practical experience." The principle of these cases was at one point recognized by the District Court when

it stated to plaintiff's counsel: "You can ask him [Yosiph] about anything that is a proper subject of an expert examination." [R. 73.]

But the court completely misconstrued the scope of the expert's competence when it refused to advantage the jury of his opinion on the subject of his specialty. That such refusal is grounds for reversal is made clear by *McReynolds v. National Woodworking Co.,* 26 F. 2d 975 (D.C. Cir. 1928). There the lower court refused to admit expert testimony to establish the fact that linoleum was not laid properly on a concrete floor. The appellate court reversed, recognizing the prejudicial effect of this exclusion. In *Ekblom v. G. O. Reed, Inc.,* 71 F. 2d 399 (5th Cir. 1934), the Appellate Court reversed a lower court's rejection of an expert witness's conclusion as to the safe way of handling a boiler.

The District Court here barred expert testimony on whether the rug was safely installed [R. 69], and also barred the expert's response to a hypothetical question based on facts in evidence as calling for the same testimony previously rejected. [R. 91-92.] It barred a response to a hypothetical question, based on facts previously elicited, concerning the safety of the rug installation. Exclusion of this testimony deprived the jury of information and opinion which would have enabled it to evaluate the evidence more competently and intelligently. In *United States Smelting Co. v. Parry,* 166 Fed. 407, 415 (8th Cir. 1909), it was held that though the jury was more or less capable of judging the safety of a scaffold, it was

> "quite reasonable to believe that they were not as capable of doing so as a practical brick mason and builder of many years' experience in the use and construction of scaffolds, and that the opinion of a witness possessed of the special knowledge which is born of such experience was calculated appreciably to aid them in reaching a correct conclusion."

This principle is directly applicable. A jury cannot be expected to know, of its own day-to-day experience, the safest method of installing rugs in hotel lobbies. They cannot be expected to know the significance of the matting underneath the rug in providing for the safety of persons walking on the rug. Rugs, or matting underneath them, are not objects totally foreign to a juror's knowledge. However, the correct method of installing an 11x30-foot rug in a hotel lobby is beyond what a jury may reasonably be expected to know without enlightenment.

II.

OTHER ERRONEOUS EVIDENTIARY RULINGS OF THE COURT WERE HIGHLY PREJUDICIAL AND CONSTITUTE REVERSIBLE ERROR.

a. The court erroneously and inconsistently admitted testimony of appellees' non-expert witness as to the proper manner of laying a rug, though the testimony of appellant's expert witness was excluded.

We have seen that the District Court blocked all of appellant's attempts to introduce expert testimony of the adequacy of the rug installation. Nevertheless,

it permitted appellees' hotel manager, in no way an expert, to testify in detail as to the proper way to lay a rug—the very testimony excluded when offered by appellant's expert. [R. 179.] The inconsistency of the court's rulings makes prejudice manifest. Appellant's expert should have been allowed to testify. He was not. Appellees' non-expert certainly should not have been allowed to give expert testimony, in view of the court's silencing of Mr. Yosiph. Yet appellees' witness *was* so allowed. The refusal to permit Mr. Yosiph's testimony is clearly error, sufficient for reversal. The admission of the hotel manager's testimony, grounds in itself for reversal, only compounds the error.

b. The court's admission, over objection, of testimony by appellees' witness as to the absence of previous accidents and the condition of the rug at the date of trial was materially prejudicial error.

The hotel manager was asked on appellees' direct examination, "What is the condition of the rug at the present time?" to which he answered, "It is in good shape" [R. 183], and, moreover, testified that there had been no previous accidents "as a result of those rugs" [R. 183], despite immediate objection. The court overruled appellant's objection and stated:

> "Well, the objection is overruled. It's [The rug is] in good shape—of course, the basis of your objection, Mr. Melchior, is that it is not material because it isn't at the time of the accident. Now, I would like the jury to understand the basis of my ruling. The basis of my ruling is that, if that is the same rug and it is now in good shape, the

> fair inference can be drawn that at the time of the accident it was in good shape." [R. 184.]

This position is exactly contrary to that taken by the court during appellant's case, where the ruling was that "you are not entitled to have the witness say anything at all about what the condition is today [etc.]" [R. 72.]

Testimony regarding present condition and lack of previous accidents is proper only where there are conditions of permanency, such as defects in fixed structures like buildings, machines, sidewalks and streets. It is not admissible where it relates to a temporary condition which can change from day to day. See *Chesapeake & Ohio Ry. Co. v. Newman,* 243 F 2d 804 (6th Cir. 1957). In *Hilleary v. Earle Restaurant, Inc.,* 109 F. Supp. 829 (D.D.C. 1952), evidence of the lack of accidents was admissible only if it concerned conditions immediately before and after the event. As the court below said in regard to appellant's witness's proffered testimony:

> "Telling us what the conditions are up there today or were yesterday or were at any time, except the morning of the accident is immaterial." [R. 74.]

The same rule should apply to the respondent too.

California law is even more rigorous than federal law on this point. In *Thompson v. B. F. Goodrich Co.,* 48 Cal. App. 2d 723, 120 P. 2d 693 (1942), to the contention that the trial court erred in excluding evidence that nobody had ever fallen over a platform,

the court said, "Even though it be held in some jurisdictions that such evidence is admissible, the rule has not been adopted in California." 120 P. 2d at 696, citing *Carty v. Boeseke-Dawe Co.,* 2 Cal. App. 646, 84 Pac. 267 (1906), and *Sheehan v. Hammond,* 2 Cal. App. 371, 84 Pac. 340 (1906). See also *Murphy v. Lake County,* 106 Cal. App. 2d 61, 234 P. 2d 712 (1951).

It is evident that in the few instances where evidence of the lack of previous accidents is admissible, there must first be established a fixed or permanent situation. The temporary nature of the rug installation, though, was important to appellant's case. There was nothing fixed or permanent about the rug installation. Appellees' own witnesses bolster appellant's case on this issue. [R. 158, 162, 166, 187.] We are not dealing with a sidewalk, a building, or a machine. What is in issue is a rug which responds to weather conditions, to traverse, to disturbances by the shoes of travelers—and as a consequence changes in condition depending on a variety of stimuli and occurrences. Testimony as to its condition in January, 1959 (the time of trial), when the accident occurred in August, 1957, or the absence of accidents in years prior to or after 1957 was highly improper and could only erroneously reflect on the condition of the carpet at the time of the accident. Significantly, Mr. Yosiph's inspection of the rug prior to trial was for the purpose of evaluating, with the aid of the photographic exhibits, the condition and safety of the carpet installation in August, 1957.

Not only was this harmful and self-serving testimony erroneously admitted; permitting appellees to call the carpet safe while denying appellant any opportunity to testify about it for even her limited purpose is a manifest unfairness which in itself deprived appellant of a fair trial.

III.

THE COURT BELOW ERRED IN PERMITTING APPELLEES TO AMEND THEIR PLEADING NEAR THE CONCLUSION OF THE TRIAL.

Appellees' witness Hoffer testified near the end of the trial that the Maurice Hotel was not owned or operated by appellee Western Hotels, Inc., despite appellees' contrary pleading in their answer. A motion to amend the pleadings was then made by appellees' attorney and granted over objection. [R. 175-176.] Here the appellees late in the trial opened an issue that had been undisputed and uncontested, and in fact admitted. Appellant could not under these circumstances investigate or contest the new and surprising claim of Western Hotels, Inc.

Rule 15(b), F.R.C.P., provides that amendments to conform to the evidence may be granted only with respect to "issues not raised by the pleadings [which] are tried by express or implied consent of the parties." Here there was no consent; there was an objection. Thus it was a clear abuse of discretion to permit Western Hotels to amend its pleading as it

did. See 3 Moore, Federal Practice 15.13 at pp. 847-848 (2d ed. 1948). The answer had justifiably relieved appellant from in any way investigating the affiliation of Western Hotels, Inc., with the Maurice Hotel further. One of the main purposes of pleadings is to limit trial issues so that time, effort and money are not wasted on matters about which there is no dispute. Thus, in *Cheffey v. Pennsylvania R. Co.,* 79 F. Supp. 252 (E.D. Pa. 1948), the court granted a new trial where plaintiff was permitted to amend her pleadings to allege a separate ground for negligence, as she was about to rest her case. The court said:

> "Of course, plaintiff can move to amend to conform to the proof offered at the trial. Here, however, defendant objected to the amendment at such a 'late hour' in the proceedings, defendant having had no warning or notice that it would be obliged to meet such a question. . . ." Id. at 259.

Despite the fact that defendant there "did not press his plea of surprise and request a continuance," *id.* at 260, the court viewed the amendment to be so prejudicial to defendant's proper conduct of its case as to warrant a new trial; and the Supreme Court stated in *Mulhall v. Keenan,* 85 U.S. 342, 350 (1873), "if there were surprise, the only remedy for it was a motion for a new trial." Here there was material prejudice and obvious unfairness in the District Court's ruling, which did not permit appellant an opportunity to "make preparation to meet the changed situation" *Smith v. White,* 48 F. Supp. 554, 557 (E.D.

Mo. 1942), despite her plea that she "wasn't prepared to meet this issue". [R. 176.]

IV.

THE COURT'S CONDUCT DURING THE TRIAL UNFAIRLY PREJUDICED APPELLANT'S CASE.

Appellant established by the witness Marshall that service of process could not be effected on Mr. Lohman, who had photographed certain pictures in evidence. [R. 103-05.] On cross-examination, over objection, appellees' counsel was permitted to address the following statement to the witness:

> "Well, let me give it [Lohman's telephone number] to you. Yon can call him. He is there any time you want to call him and so is his wife. If you really wanted him you could go down and get him right now. The telephone number is Juno 3-9696. Do you want to make a note of it?" [R. 107.]

The court overruled plaintiff's objection to this remarkable "question" and said to her counsel that "we don't tolerate that sort of argument." [R. 107.]

Unquestionably, counsel's testimony was highly improper. It was indefensible for the court not only to permit such testimony, but particularly, to inform appellant's counsel, in the presence of the jury, that objection to it would not be tolerated.

It can readily be seen that the jury would be heavily influenced in favor of appellees' counsel who had

clearly won the favor of the court. Appellant realistically had no opportunity to submit her case to an impartial jury. This episode, occurring in connection with a minor point in the trial, is singled out to show that before the jury appellees were consistently given preferred, and wrongfully preferred, treatment over appellant by the trial court. See also, *e.g.,* R. 82, 104-105, 117-119, 121-122, 179-180, 183-184.

In *Quercia v. United States,* 289 U.S. 466 (1933), where the trial judge commented on the credibility of a witness, the Court found prejudicial error and ordered the judgment reversed. The Court pointed out that the "influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.'" *Id.* at 470. And in *Sprinkle v. Davis,* 111 F. 2d 925 (4th Cir. 1940), prejudicial error was found where a court instructed counsel to be fair and not attempt to mislead the jury when counsel asked a witness why he had not testified on a certain point at a former trial. Application of the spirit and letter of these cases warrants reversal in this case.

V.

THE TRIAL COURT'S CHARGE WAS TOO GENERAL.

The trial court's charge on negligence covered some 20 lines of the record [R. 204]; the charge on contributory negligence took about seven printed lines [R. 205]; and there were about ten more lines about

appellant's status as an invitee [R. 211]. These portions of the charge are proper as general statements of law, but they did not aid the jury sufficiently in coming to grips with the facts presented by the evidence in the case.

We had requested the court to charge particularly on lack of contributory negligence in the face of unanticipated danger, failure to observe an obvious danger, and the assumption that one's way is clear. [R. 199, 214-215.] These instructions [R. 14-15] were taken nearly verbatim from the very recent case of *Laird v. T. W. Mather, Inc.*, 51 Cal. 2d 210. They were unquestionably correct and related to the evidence, but they were refused because the court would not—and did not—charge anything "that specific" [R. 198].

Appellant had the right to a full charge which dealt with the concrete issues raised by the evidence, rather than to a mere general statement of only the most basic legal propositions. As this court said in reversing a judgment in *Woodworkers Tool Works v. Byrne,* 191 F. 2d 667, 675-676, "The learned trial judge called attention to the pertinent doctrine of inspection but did not charge in terms of the Escola case . . . He did not charge the jury as to the conditions under which X-ray examinations would have been justified or required . . . [etc.]" Or see *Southern Pac. Co. v. Guthrie,* 180 F. 2d 295, 301 (C.A. 9th, 1949, op. adh. to, 186 F. 2d 926, cert. den. 341 U.S. 904): "If a judge states the law incorrectly, *or refuses to state it at all,*

on a point material to the issue, the party aggrieved will be entitled to a new trial." [Emphasis added.] This is plainly what occurred here. A charge too general in terms, or which does not relate itself to the facts in evidence, is inadequate to inform the jury. See 88 C.J. 2d Trials, §§379b and 386. The court's overly casual and incomplete charge in this case did not enlighten the jury as to what Mrs. Cohen, passing through the hotel lobby, could take for granted without being contributorily negligent. This was important error.

VI.

THE INSTRUCTIONS ACTIVELY MISLED THE JURY.

Juries react to statements concerning insurance in negligence actions. The law of evidence has responded to such reaction: evidence may not be admitted as to the pecuniary status of defendants. The prejudicial nature of such evidence has been noted by state and federal courts. See *e.g., The Kearney,* 3 F. Supp. 718 (E.D. N.Y. 1933); *Crawford v. Alioto,* 105 Cal. App. 2d 45, 233 P.2d 148 (1951); *Pierce v. United Gas & Electric Co.,* 161 Cal. 176, 118 Pac. 700 (1911); *Roche v. Llewellyn Iron Works Co.,* 140 Cal. 563, 74 Pac. 147 (1903). The sensitivity of the jury to matters of insurance in negligence actions requires a court to exercise caution to prevent such issues from coming improperly before the jury. See *Quercia v. United States, supra.* Thus certain misleading phraseology of the court in instructing the jury possesses a sig-

nificance and an influence subtly damaging to appellant's case. Specifically, the court charged that the appellees were "not insurers, they don't carry that kind of legal responsibility." [R. 204.] Any lawyer will appreciate that the court, quite correctly, was speaking of the scope of appellees' legal duty, rather than on the question whether they did not carry, or were ever excused from carrying, casualty or liability insurance; and it was for that reason that counsel failed to object. However, the jury had no reason to be familiar with this special lawyers' meaning of "insurers", and could hardly help but be seriously confused and prejudiced by this unfortunate formulation. If references to insurance are to be kept out of casualty litigation, care must be taken to avoid their inadvertent and greatly misleading inclusion in this manner, so that laymen will properly understand the language of lawyers and judges.

CONCLUSION.

This court knows as well as we do that tripping cases are hard cases for plaintiffs to win. Plaintiffs should, however, be entitled to a fair chance at their goal. Here the plaintiff-appellant's opportunity to reach the jury was destroyed by the exclusion of her proper expert testimony, by many inconsistent and improper rulings on evidence in favor of appellees, by the court's unwarranted and belittling rulings and comments during the trial, and by a too limited and

prejudicial charge. So that plaintiff may have a fair trial, it is prayed that the judgment be reversed and a new trial granted.

Dated, October 7, 1959.

Respectfully submitted,
FREED & FREED,
KURT W. MELCHIOR,
BARRY SIDMAN,
Attorneys for Appellant.

STRASSER, SPIEGELBERG, FRIED & FRANK,
Of Counsel.